6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA-HQ-OAR-2008-0334; FRL-9621-7]

RIN 2060-AQ89

National Emission Standards for Hazardous Air Pollutants for Chemical Manufacturing Area Sources

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; notice of reconsideration of final rule.

SUMMARY: On October 29, 2009, the EPA promulgated national emission standards for the control of hazardous air pollutants for nine area source categories in the chemical manufacturing sector: Agricultural Chemicals and Pesticides Manufacturing, Cyclic Crude and Intermediate Production, Industrial Inorganic Chemical Manufacturing, Industrial Organic Chemical Manufacturing, Inorganic Pigments Manufacturing, Miscellaneous Organic Chemical Manufacturing, Plastic Materials and Resins Manufacturing, Pharmaceutical Production and Synthetic Rubber Manufacturing. Following that action, the Administrator received a petition for reconsideration. In response to the petition, the EPA is reconsidering and requesting comment on several provisions of the final rule. The EPA is also proposing certain revisions to its approach for addressing malfunctions and taking comment on those revisions. The EPA is further soliciting

comment on the standards applicable during startup and shutdown periods, as set forth in the final rule. Additionally, the EPA is proposing amendments and technical corrections to the final rule to clarify applicability and compliance issues raised by stakeholders subject to the final rule.

DATES: Comments. Comments must be received on or before **[INSERT DATE 60 DAYS FROM DATE OF PUBLICATION]**.

Public Hearing. If anyone contacts EPA requesting to speak at a public hearing by **[INSERT DATE 10 DAYS FROM DATE OF PUBLICATION]**, a public hearing will be held on **[INSERT DATE 15 DAYS FROM DATE OF PUBLICATION]**. For further information on the public hearing and requests to speak, contact Ms. Janet Eck at (919) 541-7946 to verify that a hearing will be held. If a public hearing is held, it will be held at 10 a.m. at the EPA's Environmental Research Center Auditorium, Research Triangle Park, North Carolina, or an alternate site nearby.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2008-0334, by one of the following methods:

- www.regulations.gov: Follow the on-line instructions for submitting comments.
- Email: a-and-r-Docket@epa.gov, Attention Docket ID No. EPA-HQ-OAR-2008-0334.
- Fax: (202) 566-9744, Attention Docket ID No. EPA-HQ-

OAR-2008-0334.

- Mail: U.S. Postal Service, send comments to: Air and Radiation Docket and Information Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW, Washington, DC 20460, Attention Docket ID No. EPA-HQ-OAR-2008-0334.
- Hand Delivery: In person or by courier, deliver comments to: EPA Docket Center (2822T), Room 3334, 1301 Constitution Ave., NW, Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-HQ-OAR-2008-0334. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or email. The www.regulations.gov website is an "anonymous access" system, which means the EPA will not know your identity or contact

information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through www.regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at http://www.epa.gov/epahome/dockets.htm. Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the EPA Docket Center, EPA West Building, Room

3334, 1301 Constitution Ave., NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Docket Center is (202) 566-1742.

FOR FURTHER INFORMATION CONTACT: Mr. Nick Parsons, Refining and Chemicals Group (E143-01), Sector Policies and Programs Division, Office of Air Quality Planning and Standards, Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541-5372; fax number: (919) 541-0246; email address: parsons.nick@epa.gov.

SUPPLEMENTARY INFORMATION:

Organization of this Document. The following outline is provided to aid in locating information in this preamble.

A red-line version of the regulatory language that incorporates the changes in this action is available in the docket.

I. General Information

A. Does this notice of reconsideration apply to me?

The regulated categories and entities potentially affected by this action include:

Industry Category	NAICS Code[1]	Examples of Regulated Entities
Chemical Manufacturing	325	Chemical manufacturing area sources that use as feedstock, generate as byproduct or produce as product, any of the hazardous air pollutants (HAP) subject to this subpart except for: (1) Processes classified in NAICS Code 325222, 325314 or 325413; (2) processes subject to standards for other listed area source categories[2] in NAICS Code 325; (3) certain fabricating operations; (4) manufacture of photographic film, paper and plate where material is

	coated or contains chemicals (but the manufacture of the photographic chemicals is regulated); and (5) manufacture of radioactive elements or isotopes, radium chloride, radium luminous compounds, strontium and uranium.

[1] North American Industry Classification System.
[2] The source categories in NAICS Code 325 for which other area source standards apply are: Acrylic Fibers/Modacrylic Fibers Production, Chemical Preparation, Carbon Black, Chemical Manufacturing: Chromium Compounds, Polyvinyl Chloride and Copolymers Production, Paint and Allied Coatings and Mercury Cell Chlor-Alkali Manufacturing.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this reconsideration action. To determine whether your facility may be affected by this reconsideration action, you should examine the applicability criteria in 40 CFR 63.11494 of subpart VVVVVV (National Emission Standards for Hazardous Air Pollutants for Chemical Manufacturing Area Sources). If you have any questions regarding the applicability of the final rule to a particular entity, consult either the air permit authority for the entity or your EPA regional representative, as listed in 40 CFR 63.13.

B. What should I consider as I prepare my comments to the EPA?

Submitting CBI. Do not submit information that you consider to be CBI electronically through http://www.regulations.gov or email. Send or deliver information identified as CBI to only the following address: Mr. Nick Parsons, c/o OAQPS Document Control

Officer (Room C404-02), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attn: Docket ID No. EPA-HQ-OAR-2008-0334.

Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to the EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. If you submit a disk or CD-ROM that does not contain CBI, mark the outside of the disk or CD-ROM clearly that it does not contain CBI. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

C. How do I obtain a copy of this document and other related information?

Docket. The docket number for this action and the final rule (40 CFR part 63, subpart VVVVVV) is Docket ID No. EPA-HQ-OAR-2008-0334.

World Wide Web (WWW). In addition to being available in the docket, an electronic copy of this action is available on the WWW through the Technology Transfer Network (TTN) website. Following signature, a copy of this notice will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at http://www.epa.gov/ttn/oarpg. The TTN provides information and technology exchange in various areas of air pollution control.

II. Background Information

Section 112(d) of the Clean Air Act (CAA) requires the EPA to establish national emission standards for hazardous air pollutants (NESHAP) for both major and area sources of HAP that are listed for regulation under CAA section 112(c). A major source is any stationary source that emits or has the potential to emit 10 tons per year (tpy) or more of any single HAP or 25 tpy or more of any combination of HAP. An area source is a stationary source that is not a major source.

On October 29, 2009 (74 FR 56008), the EPA issued the NESHAP for the nine chemical manufacturing area source (CMAS) categories that were listed pursuant to CAA sections 112(c)(3)

and 112(k)(3)(B). The nine area source categories are Agricultural Chemicals and Pesticides Manufacturing, Cyclic Crude and Intermediate Production, Industrial Inorganic Chemical Manufacturing, Industrial Organic Chemical Manufacturing, Inorganic Pigments Manufacturing, Miscellaneous Organic Chemical Manufacturing, Plastic Materials and Resins Manufacturing, Pharmaceutical Production and Synthetic Rubber Manufacturing.

CAA section 112(k)(3)(B) directs the EPA to identify at least 30 HAP that, as a result of emissions from area sources, pose the greatest threat to public health in the largest number of urban areas. The EPA implemented this provision in 1999 in the Integrated Urban Air Toxics Strategy, (64 FR 38715, July 19, 1999) (Strategy). Specifically, in the Strategy, the EPA identified 30 HAP that pose the greatest potential health threat in urban areas, and these HAP are referred to as the "30 urban HAP." Section 112(c)(3) of the CAA requires the EPA to list sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the emissions of the 30 urban HAP are subject to regulation. The EPA completed this requirement in 2011 (76 FR 15308, March 21, 2011). The chemical manufacturing area source categories were listed to

satisfy this requirement for 15 of the 30 urban HAP.[1] Pursuant to CAA section 112(d)(5), the NESHAP reflect generally available control technologies or management practices (GACT). The NESHAP apply to each chemical manufacturing process unit (CMPU) that uses, generates or produces any of the 15 urban HAP for which the area source categories were listed (collectively "chemical manufacturing urban HAP" or "Table 1 HAP").

On February 12, 2010, following promulgation of the final rule, the EPA received a petition for reconsideration from the American Chemistry Council (ACC) and the Society of Chemical Manufacturers & Affiliates (SOCMA) ("Petitioners"). A copy of this petition is provided in the docket (see Docket ID No. EPA-HQ-OAR-2008-0334). Petitioners, pursuant to CAA section 307(d)(7)(B), requested that the EPA reconsider six provisions in the rules: (1) The requirement that major sources that installed air pollution controls after 1990, and, as a result, became area sources, obtain a title V permit; (2) the requirement that sources subject to the final rule and any overlapping provision in another rule comply with each provision independently, or with the most stringent requirements of each rule; (3) the requirement that leak inspections include direct and proximal (thorough) inspection of all areas of potential

[1] The 15 urban HAP for which the chemical manufacturing area source categories were listed are identified in table 1 of the final rule.

leak within the CMPU; (4) the requirement that process vessels in HAP service be equipped with a cover or lid that must be in place at all times when the vessel contains HAP, except for material addition and sampling; (5) the requirement to conduct leak inspections while the equipment is in HAP service; and (6) the requirement that a CMPU include all equipment and processes used to produce a "family of materials." The arguments in support of these requests are provided in the petition and described briefly below. Petitioners also requested that the EPA stay the effectiveness of these provisions of the rule to save many facilities from needlessly having to file the initial notifications required by the final rule.

On June 15, 2010, the EPA sent a letter to Petitioners informing them that the EPA was granting the request for reconsideration on at least one issue raised in the petition, and that the agency would identify the specific issue or issues for which it was granting reconsideration in the reconsideration notice that would be published in the **Federal Register**. The letter also indicated that the EPA considered the request for a stay to be moot because the due date for initial notifications had already passed.

III. Actions We Are Taking

In this notice, we are granting reconsideration of, and requesting comment on, the six issues raised by Petitioners in their petition for reconsideration. **Section IV** of this preamble summarizes these issues and discusses our proposed responses to each issue.

We are also proposing additional provisions related to malfunctions and requesting comment on the provisions in the final rule that address periods of startup and shutdown. We are also proposing amendments to, and taking comment on, the standards applicable to metal HAP process vents. Finally, we are proposing technical corrections to certain applicability and compliance provisions in the final rule.

We are seeking public comment only on the issues specifically identified in this notice. We will not respond to any comments addressing other aspects of the final rule or any other related rulemakings.

IV. Discussion of Issues for Reconsideration

This section of the preamble contains the EPA's basis for our proposed responses to the issues identified in the petition for reconsideration. We solicit comment on all proposed responses and revisions discussed in the following sections.

A. Title V Permitting Requirements

The EPA proposed to exempt all chemical manufacturing area sources from the requirement to obtain a title V permit. In the final rule, in response to comments and after a full review of the record, the EPA stated that it was not finalizing the exemption for major sources that became synthetic area sources by installing air pollution controls after 1990. Among other things, the agency explained that we made the change, in part, because we failed to consider the large number of such sources in proposing the exemption, and because these sources had uncontrolled emissions that made them much more like major sources. See 74 FR 56013, October 29, 2009. Petitioners maintain that the proposed exemption of CMAS facilities from title V permitting requirements was fully and correctly justified in the preamble to the proposed CMAS rule. The Petitioners also claim:

- The EPA's assertion in the final rule that facilities that installed control equipment to become synthetic area sources are "generally larger and more sophisticated" than other chemical manufacturing area sources contradicts our earlier finding in the proposed rule that many of the facilities that would be affected by the CMAS rule are small entities without the resources to comply with permitting requirements. The Petitioners also state that approximately 87 percent of SOCMA members and 45 percent of

ACC members are small businesses, which they cite as support for the proposed finding.

- The final rule fails to recognize that, in order for a facility to be treated as a synthetic area source due to the installation of controls, the facility has a legal duty to use the equipment because the control requirement must be federally enforceable. Further, the Petitioners state that, "In order to have been approved by the EPA, a state operating permit program that imposes a federally enforceable requirement to use control equipment must provide the public with notice and an opportunity to comment on draft permits . . . and must also provide for emissions reporting and public availability of reported information."
- The final rule is contrary to the decision in Alabama Power Co. v. EPA, which held that a source's potential to emit is determined by its design capacity and the anticipated functioning of the air pollution control equipment. Thus, the petitioners claim that whether a facility is a natural area source or a synthetic area source (due to either operational limits or the use of control devices) should not matter for regulatory purposes.

- The EPA argued in the area source rules for asphalt processing/asphalt roofing manufacturing, and paint and allied products manufacturing, that state-delegated programs are sufficient to assure compliance, and that it is not more difficult for citizens to enforce the NESHAP absent a title V permit. According to the Petitioners, these statements are equally, if not more, true for chemical manufacturing synthetic area sources.
- Title V requirements will impose substantial transactional and compliance costs on subject facilities, and limit their flexibility to respond to market opportunities.

In conclusion, Petitioners suggest that we should exempt all chemical manufacturing area sources from the requirement to obtain a title V permit consistent with the proposed rule. We reviewed our rationale, as stated in the preamble to the final rule (74 FR 56013-56014) and summarized below, for the final title V permitting requirement for facilities that became synthetic area sources by virtue of installing air pollution control devices after 1990. We continue to believe that requiring title V for synthetic area sources that installed controls to become area sources is appropriate; therefore, we are not proposing to exempt such sources from the requirement to obtain a title V permit. We are, however, making changes to the

applicability of the provision at issue. Instead of requiring a title V permit for all synthetic area sources that installed air pollution controls in order to become an area source, regardless of whether the controls were installed on an affected CMPU, we are now proposing to only require a title V permit for a synthetic area source if air pollution controls were installed on at least one CMPU subject to the final rule in order to become an area source. Such a limitation would be consistent with the standards in the final rule that are applicable only to the CMPU that emit one of the chemical manufacturing urban HAP. We are also proposing to add provisions that inform sources when they must submit a title V permit application consistent with the title V regulations at 40 CFR part 70 and 40 CFR part 71.

Pursuant to section 502(a) of the CAA, the Administrator may "exempt one or more [area] source categories (in whole or in part) from the requirements of [title V] if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome . . . ." In December 2005, in a national rulemaking, the EPA interpreted the term "unnecessarily burdensome" in CAA section 502, and developed a four-factor balancing test for determining whether title V is unnecessarily burdensome for a particular area source category, such that an exemption from title V is appropriate. See 70 FR

75320, December 19, 2005 (Exemption Rule). The EPA evaluated the chemical manufacturing area source categories pursuant to the four-factor balancing test in the proposed rule, and determined that title V permitting was unnecessarily burdensome. 73 FR 58371-58373. However, as stated above, the EPA did not finalize the exemption for synthetic area sources that became area sources by installing air pollution controls after November 15, 1990, in part, because the agency failed to consider the large number of such sources in proposing the exemption. 74 FR 56013. We explained the reasons for our oversight, and then concluded that title V was not unnecessarily burdensome and provided a reasoned basis for that conclusion, as discussed below. 74 FR 56013-56014.

In the preamble to the final rule, we noted that the chemical manufacturing area source categories are different from other area source categories we have exempted because the categories include a large number of synthetic area sources (major sources that installed air pollution controls to become area sources) and the sources in the other categories generally have very low emissions of HAP before control. We then stated that at least 10 percent of the estimated 75 facilities that are synthetic area sources for HAP by virtue of installing controls have uncontrolled HAP emissions over 100 tpy. We also indicated

that our information showed that many of the sources are located in cities, and often in close proximity to residential and commercial centers where large numbers of people live and work. We further stated that these synthetic area sources have significantly higher emissions potential when uncontrolled than the other sources in the chemical manufacturing area source categories, and that they are much more like the major sources of HAP subject to the Hazardous Organic Chemical Manufacturing NESHAP (HON) and the Miscellaneous Organic Chemical Manufacturing NESHAP (MON). For these reasons, and other reasons set forth in the preamble to the final rule, we determined that "requiring additional public involvement and compliance assurance requirements through title V is important to ensure that these sources are maintaining their emissions at the area source level, and, while there is some burden on the affected facilities, we think that the burden is not significant because these facilities are generally larger and more sophisticated than the natural area sources and sources that took operational limits to become area sources." 74 FR 56014.

Contrary to the Petitioners' first assertion, we do not believe that there is a conflict between our finding that many CMAS facilities are small entities that lack the technical and financial resources to comply with title V, and our finding that

CMAS facilities that are synthetic area sources due to the use of control devices are generally larger and more sophisticated than other facilities covered by the final rule. The fact that nearly all SOCMA members are small businesses does not, by itself, counter these findings. As we stated in the preamble to the final rule, an estimated 450 CMAS facilities have processes that would be subject to the rule. Of those, we estimated that 75 are synthetic area sources by virtue of add-on controls, and only 47 of these facilities were estimated to need a new title V permit because the remainder of the sources are already subject to title V for other reasons. Of the 47 sources that would require a new title V permit under the requirement in the final rule, we estimated that at least two-thirds of these facilities are large entities. Since we do not know whether the add-on controls at these 75 facilities are installed on a CMPU subject to the final rule, we cannot estimate the total number of facilities that would be required to obtain a new title V permit under this proposed revision to the title V permit requirement. However, we believe that it would be less than the 47 facilities that would have required a new title V permit under the final rule requirement. Based on information from SOCMA, approximately 270 member companies are small businesses. However, it is not clear how many of these companies have facilities that are

subject to the CMAS rule, how many of the subject facilities are synthetic area sources for HAP emissions due to the use of control devices or how many of the synthetic area sources for HAP emissions are subject to title V permitting requirements for other reasons. The information provided by Petitioner ACC is similarly vague on this issue.

The Petitioners also argue that the title V requirement is not appropriate because: (1) State operating permits that impose a federally enforceable requirement must provide the public with notice and the opportunity to comment on the draft permit; (2) synthetic area source limits must be federally enforceable pursuant to the definition of "potential to emit" at 40 CFR 63.2, and that it should not matter whether an area source is synthetic or natural; (3) the EPA has determined in other area source rules that state-delegated programs and federal enforceability of the standards is sufficient, and that determination is equally applicable to the area sources subject to title V in this rule; and (4) the requirement to obtain a title V permit will impose substantial compliance costs and reduce flexibility at the subject facilities. We are not proposing changes to the title V permitting requirement based on these arguments because we do not believe that they support a change in our position. First, while it is true that the EPA

regulations require federal enforceability of limitations on potential to emit HAP, Petitioners did not provide any information as to the level of public participation required to obtain such limits and whether the level of participation was as comprehensive as that required pursuant to title V. Even if Petitioners could demonstrate that the level of public participation was comparable to that required under title V, our determination would not be altered on that issue alone because title V has other important requirements that may not apply to synthetic area sources that are not subject to title V (e.g., the requirement to annually certify compliance with all applicable requirements). Second, the EPA disagrees that natural and synthetic area sources must be treated the same. As stated in the preamble to the final rule, "[synthetic area source] facilities are generally larger and more sophisticated than the natural area sources and sources that took operational limits to become area sources" (74 FR 56014). Third, we explained in the preamble to the final rule that the chemical manufacturing area sources are not similar to other area source categories that we have exempted because of the large number of synthetic area sources that installed add-on controls and the high volume of pre-control device HAP emissions from the chemical manufacturing area sources that added controls as compared with other area

sources. As these synthetic area sources have essentially the same pre-control device HAP emissions potential as a major source chemical manufacturing facility, we believe that the title V permit requirement will help ensure that these control devices remain in place and that these sources maintain their area source status. Since it is possible that the non-operation, failure or underperformance of a single control device could result in a source within this category exceeding the major source emission threshold (10 tpy or more of any single HAP or 25 tpy or more of any combination of HAP), we believe that the additional scrutiny that permitting authorities place on sources with title V permits is warranted. Finally, Petitioners have provided no information that demonstrates that the cost of compliance for affected facilities will, in fact, significantly burden the sources subject to the title V requirement, or that such requirement will limit operational flexibility. We request comments and information that address these issues, including information and requirements that are required by state operating permit programs, so that we can more thoroughly evaluate applicability of title V for the identified sources.

As stated above, we are proposing changes to the applicability of the title V permit requirement to synthetic area sources that installed controls. The proposed changes more

clearly identify the sources subject to title V as those that route (or have routed) emissions from at least one process unit subject to the final rule to a control device(s) that is required to maintain synthetic area source status at the facility, which will likely reduce the number of sources required to obtain a title V permit, if promulgated. Specifically, because the standards apply only to CMPU that meet the specific applicability criteria in the rule, we request comment on whether the title V permitting requirement should be applicable only if one or more of the CMPU that are subject to the final standards are controlled by the air pollution control equipment necessary for the facility to maintain area source status. We are also proposing to include language that informs sources subject to title V requirements when they must submit a title V permit application. The EPA is including these new provisions because, on March 14, 2011, the agency issued a final rule staying the requirement to obtain a title V permit until the final reconsideration rule is published in the **Federal Register**. 76 FR 13514. Because the stay will be lifted once the final rule is published in the **Federal Register**, we determined it was necessary to include an application deadline for those existing sources currently subject to the final rule to avoid confusion as to when title V permit applications would be due.

The proposed application deadline for existing sources provides the full 12 months otherwise available to sources newly subject to title V pursuant to the EPA regulations at 40 CFR part 70 and 40 CFR part 71. See 40 CFR 70.5(a)(1) and 40 CFR 71.5(a)(1). We also propose to include a provision indicating the time available for new sources and existing sources that become subject to the rule after the effective date to submit a title V permit application.[2] We solicit comment on these proposed changes to the final rule.

Additionally, we are soliciting comment on the promulgated final rule requirement that required a facility to obtain a title V permit if emissions from any process unit are (or have been) routed to the control device(s) that is required to maintain synthetic area source status at the facility.

We are requesting comment with supporting rationale on the requirement, as specified in this proposed rule and the promulgated final rule requirement outlined above. We are also interested in information that would allow us to better estimate the burden under the requirement in this proposed rule and the alternative. For example, we are interested in results of any

[2] Existing sources may become subject to the NESHAP for CMAS after the effective date of the standards because the final rule bases applicability on the use of chemical manufacturing urban HAP (Table 1 HAP) in a CMPU. 40 CFR 63.11494. If a source begins using a Table 1 HAP after the effective date, the facility will be subject to the CMAS standards, and, if the source is a synthetic area source that installed controls, the source will be subject to title V.

surveys that document: (1) The percentage and/or number of CMAS facilities that are synthetic area sources for HAP emissions because they use federally-enforceable control devices; (2) the percentage and/or number of such facilities that are using the control devices to control emissions from at least one CMAS CMPU; (3) the financial burden of obtaining a title V permit compared to sales; and (4) the percentage and/or number of such facilities that are not already subject to title V requirements for other reasons. We are not taking comment on our decision in the final rule to exempt from title V chemical manufacturing areas sources that are natural area sources or that took operational limits to become area sources.

B. Requirements When Other Rules Overlap with the Final Rule

Petitioners note that their comments on the proposed rule urged the EPA to include provisions in the final rule that would minimize the burden associated with overlapping provisions between the CMAS rule and other rules. Specifically, they recommended that the CMAS rule include provisions to allow a facility subject to the CMAS rule and any other applicable area or major source rule to opt to comply with either, and noted that such an approach has been taken in many other rules. In response to those comments, we added provisions to address overlapping requirements in the final rule. See 40 CFR 63.11500.

However, Petitioners consider the overlapping rule requirements in the final rule, which specify that a facility may elect to comply with the most stringent provisions of the applicable rules as an alternative to complying fully with each rule independently, to be "unprecedented, burdensome, and highly problematic." According to the Petitioners, concerns with the alternative are that: (1) There can be uncertainty regarding which provision is more stringent; (2) facilities will be at risk that the EPA or a delegated authority will subsequently disagree with the source's determination; and (3) the effort necessary to construct a matrix of applicable requirements and determine which are the most stringent will exceed available staff and financial resources of many area sources. In addition, Petitioners state that complying in every respect with two overlapping rules is bound to involve substantial duplication, and, in some cases, may not be possible due to conflicts between the two rules. For these reasons, Petitioners recommend that we either propose to eliminate the final language or request comment on it.

We disagree with the Petitioners' assertion that the requirements in the final rule are unprecedented and procedurally invalid. In the absence of the language in the final rule, a facility would be required to comply with all

applicable requirements in both the CMAS rule and all other applicable rules, regardless of whether some equipment is subject to more than one rule. The final CMAS rule merely made explicit the implicit requirement to comply with all applicable standards. It was in response to Petitioners' comments that the agency provided an overlapping requirements alternative that allows a facility to identify and comply with only one set of requirements (i.e., the most stringent requirements in the overlapping rules). The alternative was intended as a means of reducing the compliance burden without diminishing the level of environmental protection provided by each rule.

We did not include language that defines the more stringent requirements, as found in other rules, due to the great variety in characteristics of CMAS processes and the wide variety of compliance options in both the CMAS rule and overlapping rules. This variety makes it difficult to develop language that would not inadvertently allow a CMAS facility to comply with requirements less stringent than those contained in 40 CFR part 63, subpart VVVVVV, or less stringent than the required control level in an overlapping rule. Furthermore, as noted in the economic and control cost impacts analyses (see Docket ID No. EPA-HQ-OAR-2008-0334-0079), we expect that most CMAS facilities will be subject to only the management practices in subpart

VVVVVV. For those sources, we anticipate that it generally will not be difficult or burdensome to determine which requirements in subpart VVVVVV and an overlapping rule are the most stringent. For those sources that are unable to determine the more stringent requirement between subpart VVVVVV and an overlapping requirement, we believe it would be more appropriate to address those situations on a case-by-case basis.

We are granting reconsideration of the overlapping provisions requirement in 40 CFR 63.11500 of the final rule to allow comment on both the language in the final rule and any alternative suggestions. Specifically, we are interested in language that would reduce the compliance burden for the CMAS rule and any overlapping rules combined, yet assure that all requirements in the CMAS rule are met. We are also interested in specific examples of requirements in overlapping rules that conflict with requirements in the CMAS final rule.

C. Requirement to Conduct Direct and Proximal Leak Inspections

In the final rule, the EPA revised the provision for inspections to require that facilities conduct a "direct and proximal (thorough) inspection of all areas of potential leak within the CMPU." Petitioners object to the requirement in the final rule to conduct "direct and proximal (thorough)" inspections because they believe it requires inspections without

regard to safety or difficulty of access. Petitioners also note that areas that are difficult to inspect or unsafe to inspect or monitor are exempted from regular inspection requirements in other rules, and they point out that, in their comments on the proposed CMAS rule, they requested clarification that sensory inspections may be done from a distance when equipment is either inaccessible or unsafe for close visual inspection. Therefore, Petitioners maintain that the agency should either propose to eliminate the direct and proximal inspection requirement or request comment on it.

We have determined that the inspections required in the final rule require control that is more stringent than GACT because we are not aware of any facility conducting direct and proximal inspections of all process vessels and equipment. For this reason, and to address Petitioners' concerns, we are proposing to delete the requirement for direct and proximal inspections. However, we want to assure that sensory inspections be performed at distances such that the results are meaningful.

As a result, we are proposing that the amended rule would specify that a facility must conduct quarterly sensory inspections of all equipment and process vessels, provided these methods are capable of detecting leaks within the CMPU (i.e., the inspector is within sufficient proximity to the equipment

that leaking equipment can be detected by sight, sound or smell). We are not, however, proposing to exempt equipment that is difficult or unsafe to monitor. Rules that provide such exemptions do so because they require instrument monitoring that relies on being able to locate the instrument probe very close to the equipment being inspected (e.g., see 40 CFR part 63, subparts TT and UU). Sensory monitoring does not require intimate contact with each piece of equipment to be effective at identifying leaks. In addition, due to the wide variety of design and operating conditions throughout the source category, we also are not proposing criteria regarding an acceptable distance for inspection or the types of conditions under which the inspection may be conducted from a distance. Our intent is that each facility should conduct inspections as close as practical to the equipment to be able to detect leaks while also following procedures contained in site-specific safety plans. The proposed requirements would be consistent with sensory inspection requirements in 40 CFR part 63, subpart R. We request comment on both the direct and proximal language in the final rule and these proposed revisions.

D. Requirement for Covers or Lids on Process Vessels

We proposed to require process vessels in HAP service be closed "except when operator access is necessary." 73 FR 58377

(proposed 40 CFR 63.11495(a)). The final rule requires process vessels in HAP service to be equipped with a cover or lid that must be in place at all times when the vessel contains HAP, "except for material addition and sampling." 40 CFR 63.11495(a)(1). Petitioners contend that compliance with this management practice requirement is impossible due to safety issues and because it does not consider the need to take material out of a vessel or to conduct maintenance. Petitioners are particularly concerned that the requirement does not appear to allow openings for any type of maintenance, even after the process is shut down, and only trace levels of HAP are present. In subsequent correspondence, Petitioners suggest that their concerns would be resolved if we modify the rule so that the cover or lid requirement applies only when a process vessel is "in use" (which is a concept that they state can be easily applied), and clarify that "in use" does not include routine cleaning operations. See Docket ID No. EPA-HQ-OAR-2008-0334. Petitioners explain that the exclusion for cleaning is needed because the definition of a "chemical manufacturing process" includes routine cleaning operations, but vessels must be opened for cleaning. Therefore, the Petitioners state that we should either propose changes that would require the use of covers or

lids only when subject process vessels are in use, or seek comments on the requirement as written in the final rule.

We are granting reconsideration of the requirement to use a cover or lid on process vessels because the Petitioners comments indicate that the requirement can be interpreted as requiring control more stringent than we intended. The proposed rule specified that "all process equipment in which organic HAP is used to process material must be covered when in use, and closure mechanisms on other openings and access points in process equipment must be in the closed position during operation, except when operator access is necessary." 73 FR 58377 (proposed 40 CFR 63.11495(a)). The intent of the requirement for covers in the proposed rule was to ensure that processes do not operate with open-top vessels. The purpose of the cover is to minimize emissions from surface evaporation, but not necessarily to have a tight seal between the cover and the vessel. For the final rule, we tried to clarify what "in use" and "operator access" meant by specifying that the cover (or lid) "must be in place at all times when the vessel contains HAP, except for material addition and sampling." However, as the Petitioners have pointed out, the revised language can be interpreted as prohibiting removal of the cover, even when only traces of HAP remain in the vessel after it has been drained,

which would prohibit opening to perform maintenance or manual cleaning. Requiring use of the cover in this way is not GACT, and it was not our intent.

To address the Petitioners' issues, we are proposing to revise 40 CFR 63.11495(a)(1) in the final rule to read as follows: "Each process vessel must be equipped with a cover or lid that must be closed whenever the vessel is in organic HAP service or metal HAP service, except for manual operations that require access, such as material addition and removal, inspection, sampling, and cleaning." We note that allowing opening of a process vessel for material removal clarifies that process vessels, such as filter presses, may be opened in order to remove the filter cake.

The proposed change also would exempt manual cleaning operations from the requirement to maintain closed covers and lids while a process vessel is in organic HAP or metal HAP service. As the Petitioners noted, the definition of "chemical manufacturing process" is drawn from the definition of a "miscellaneous organic chemical manufacturing process" in 40 CFR 63.2550 of the MON. That definition includes "routine cleaning operations," which are described in the preamble to the final MON as "cleaning conducted within enclosed equipment between batches or between campaigns." The MON preamble goes on to state

that these operations "often consist of conducting solvent rinses through the equipment," and emissions are characterized as part of the emissions from a batch process vent. See 68 FR 63860, November 10, 2003. Contrary to Petitioner's assertion, this type of cleaning was included as part of the process specifically because we considered the vessels to be "in use" while it is conducted. We also consider vessels to be in use when manual cleaning is performed. To clarify this point, we are proposing to revise the definition of "chemical manufacturing process" to specify that all cleaning activities are part of the process. However, because GACT does not include the use of closed covers and lids when performing manual cleaning, we are proposing two additional changes. First, we are proposing the change noted above to exempt manual cleaning operations from the requirement to maintain covers and lids in the closed position when the vessel is in organic HAP service or metal HAP service. Second, we are proposing to revise the definition of "in organic HAP service" to specify that a process vessel is no longer in organic HAP service after the vessel has been emptied to the extent practicable (i.e., a vessel with liquid left on process vessel walls or as bottom clingage, but not in pools, due to floor irregularity, is considered completely empty), and any cleaning has been completed. We expect emissions to be minimal

during manual cleaning operations and when a process vessel is no longer in organic HAP service. We are not proposing any changes to 40 CFR 63.11494(a)(1) regarding maintenance activities because those activities would be conducted after the vessel has been drained (and possibly cleaned) and the vessel would no longer be in organic HAP service.

We request comments on both the provisions, as specified in the final rule and the proposed changes. Specifically, we request comment on whether the proposed changes effectively address the issues raised by Petitioners, and clarify the requirements without introducing unintended consequences. We also request comment on whether a change like that proposed for the definition of "in organic HAP service" is needed for the definition of "in metal HAP service." In particular, we request comment on whether a change is needed to address when vessels that contain metal HAP in the form of particulate are in use, and, if so, we request information on the types of vessels for which the change is needed and recommendations on how the language in the definition could be structured. We are also requesting comment on possible changes to the requirements for cleaning that would include requirements for manual cleaning as well as for automated rinses through closed equipment.

E. Requirement to Conduct Leak Inspections when Equipment is in HAP Service

Petitioners state that "the final rule can be read to imply that the equipment must be in HAP service when the inspection is conducted." Petitioners note that this is in contrast to the proposed rule, which would have required quarterly inspections without specifying any other conditions. Petitioners stated that they did not comment on the proposed language because they considered it to be reasonable; however, Petitioners contend that the apparent requirement in the final rule is problematic because batch processors who operate equipment in HAP service for short periods of time and have limited operating personnel may find it difficult to accomplish the required inspections during these narrow windows of time. Petitioners ask for clarification about whether this interpretation is correct, and, if it is, Petitioners state that we should either propose reverting to the proposed language, or propose language allowing quarterly leak detection and repair inspections when the equipment is in volatile organic compound (VOC) service, not just HAP service.

Based on our review of this issue, we are proposing some editorial changes to 40 CFR 63.11495(a)(3) of the final rule to make the rule easier to read and understand. These changes are

described in Section VII of this preamble. However, we decided not to propose changes as suggested by the Petitioners because we have several concerns regarding how inspections can be conducted effectively when the process is not operating in HAP service. We request comment on both the specific concerns described below, as well as all other aspects of the requirements in the final rule related to the timing of inspections. First, because the configuration of process vessels and equipment likely changes from one CMPU to the next, we request comment on how sources would track which vessels and equipment to inspect in VOC service if we adopted Petitioners' approach and whether this effort would negate any advantages of having flexibility to inspect at times other than when the subject CMPU is operating in organic HAP service. Second, process vessels are generally opened and cleaned when reconfiguring to create a different CMPU, and equipment connections are also often opened. Therefore, we also request comment discussing how inspections in VOC service for a different configuration would provide information that is relevant to determining whether there are leaks from the subject CMPU. Finally, if someone elects to conduct Method 21 monitoring rather than sensory inspections, the instrument reading obtained would be related to the concentration of organic compound in the

fluid and the response factor of the instrument for that organic compound. Thus, we request comment on the need to specify criteria for the type of fluid that may be used when conducting inspections of vessels and equipment in VOC service (e.g., that the VOC concentration must be no less than the total organic compound concentration in the subject CMPU when in organic HAP service). We will consider adopting the Petitioners' approach after reconsideration if we can adequately address these issues.

F. Applicability of the Family of Materials Concept

After proposal, the rule was revised in response to comments from Petitioners and others that argued applicability should be established on a CMPU basis instead of facility-wide basis. Petitioners specifically suggested that the EPA adopt the CMPU construct. We defined the CMPU in the final rule to include "all process vessels, equipment, and activities necessary to operate a chemical manufacturing process that produces a material or family of materials . . . . A CMPU consists of one or more unit operations and any associated recovery device." 40 CFR 63.11494(b). In adopting the CMPU construct, we determined that, to adequately characterize the CMPU, the applicability of the rule should extend to the "family of materials" because the CMPU concept is derived from the MON, and production of a family of materials is part of a single process unit in the MON.

Furthermore, as in the MON, the CMAS rule specifies mass emission thresholds above which more stringent control of batch process vents is required. Petitioners state that it can be difficult under the CMAS rule to determine what constitutes a family of materials. Petitioners believe that the term "family of materials" effectively expands the scope of a CMPU to include equipment that is not part of a process that uses or produces Table 1 HAP. Petitioners contend that there is no policy justification for applying the CMAS rule this broadly. Therefore, Petitioners request that the EPA interpret the "family of materials" term in such a way as to avoid regulating equipment that is not used to process a Table 1 HAP. Alternatively, Petitioners suggest that the EPA propose eliminating the phrase "or a family of materials" from the rule.

The definition of "family of materials" in the MON, and referenced in 40 CFR 63.11502 of the CMAS final rule, is as follows:

> Family of materials means a grouping of materials with the same basic composition or the same basic end use or functionality produced using the same basic feedstocks with essentially identical HAP emission profiles (primary constituent and relative magnitude on a pound per pound basis) and manufacturing equipment configuration. Examples

of families of materials include multiple grades of the same product or different variations of a product (e.g., blue, black and red resins).

As in the MON, the intent of the family of materials concept in 40 CFR part 63, subpart VVVVVV is to ensure that sources will not be able to improperly avoid installation of add-on controls for batch process vent emissions by creating separate CMPU for production of essentially the same products (i.e., products produced from the same basic raw materials, with essentially identical HAP emissions, and using the same configuration of manufacturing equipment). For example, a series of polymer products that differ only in molecular weight or the type of non-HAP additive are considered a family of materials when the same primary raw materials are used, the same types of HAP are emitted and the same configuration of production equipment is used. However, because the definition of family of materials in the final rule uses the term “essentially” identical HAP emission profiles, a family of materials potentially could include some products whose production does not involve Table 1 HAP. Therefore, to clarify the requirements, we are proposing to revise the definition of family of materials to state that only those products whose production involves

emission of the same Table 1 HAP are to be considered part of a family of materials.

We also want to clarify the family of materials concept as it relates to production of isolated intermediates. A chemical manufacturing process is defined, in part, as "all equipment which collectively functions to produce a product or isolated intermediate." An isolated intermediate is defined, in part, as "a product of a process that is stored before subsequent processing." (As discussed in section VII of this preamble, we are proposing to add a definition of "isolated intermediate" that is consistent with the definition in the MON.) Even if an isolated intermediate and final product are produced using the same manufacturing equipment configuration and have the same Table 1 HAP emissions, they generally cannot be part of a family of materials because the definition specifies production of all products in the family must involve the same basic feedstocks. This condition would not be met if an isolated intermediate is used as a feedstock in later production of a final product. Furthermore, the definition of family of materials specified that all products in the family must have the same basic composition, end use, or functionality. This condition also would not be met in a situation where the isolated intermediate is transformed in the process to produce the final product.

We are requesting comment on all aspects of the family of materials concept, including the proposed change. We are particularly interested in descriptions of situations where someone thinks it would apply, but should not, and we request suggestions for additional changes that would make it easier to understand, apply and enforce. We are not, however, accepting comments on the use of the CMPU as the basis for determining applicability of the CMAS final rule.

V. Requirements During Periods of Startup, Shutdown and Malfunction (SSM)

During the comment period of the proposed rule, the United States Court of Appeals for the District of Columbia Circuit vacated two provisions in the EPA's CAA section 112 regulations governing the emissions of HAP during periods of startup, shutdown and malfunction (SSM). Sierra Club v. EPA, 551 F.3d 1019 (D.C. Cir. 2008), cert. denied, 130 S. Ct. 1735 (U.S. 2010). Specifically, the Court vacated the SSM exemption contained in 40 CFR 63.6(f)(1) and 40 CFR 63.6(h)(1), that are part of a regulation, commonly referred to as the "General Provisions Rule," that the EPA promulgated under section 112 of the CAA. When incorporated into CAA section 112(d) regulations for specific source categories, the exemption in these two provisions exempts sources from the requirement to comply with

the otherwise applicable CAA section 112(d) emission standard during periods of SSM.

The proposed CMAS rule contained references to the vacated provisions. Because the provisions were vacated, we removed the references in the final rule, and, in their place, we included alternative standards for startup and shutdown periods for continuous process vents. Table 3 to 40 CFR part 63, subpart VVVVVV. For batch process vents, we determined that startup and shutdown periods were already accounted for in the existing standard, and we determined that the remaining equipment did not have periods of startup and shutdown. 74 FR 56013. We declined to establish a different standard for malfunctions, as suggested by commenters. 74 FR 56033.

Further, as explained in the preamble to the final rule (74 FR 56033), periods of startup, normal operations and shutdown are all predictable and routine aspects of a source's operations. However, by contrast, malfunction is defined as a "sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment or a process to operate in a normal or usual manner * * *" (40 CFR 63.2). Nothing in CAA section 112(d) or in case law requires that the EPA anticipate and account for the innumerable types of potential malfunction events in setting emission

standards. See Weyerhaeuser v. Costle, 590 F.2d 1011, 1058 (D.C. Cir. 1978) ("In the nature of things, no general limit, individual permit, or even any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by 'uncontrollable acts of third parties,' such as strikes, sabotage, operator intoxication or insanity, and a variety of other eventualities, must be a matter for the administrative exercise of case-by-case enforcement discretion, not for specification in advance by regulation."). Further, it is reasonable to interpret CAA section 112(d) as not requiring the EPA to account for malfunctions in setting emissions standards.

We believe it would be impracticable to take malfunctions into account in setting CAA section 112(d) standards for chemical manufacturing area sources. As noted above, by definition, malfunctions are sudden and unexpected events, and it would be difficult to set a standard that takes into account the myriad different types of malfunctions that can occur across all sources in the categories. Moreover, malfunctions can vary in frequency, degree and duration, further complicating standard setting. See, e.g., Sierra Club v EPA, 167 F. 3d 658, 662 (D.C. Cir. 1999) (the EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem. We

generally defer to an agency's decision to proceed on the basis of imperfect scientific information, rather than to "invest the resources to conduct the perfect study.").

In the event that a source fails to comply with the applicable CAA section 112(d) standards as a result of a malfunction event, the EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions. The EPA would also consider whether the source's failure to comply with the CAA section 112(d) standard was, in fact, "sudden, infrequent, not reasonably preventable" and was not instead "caused in part by poor maintenance or careless operation." 40 CFR 63.2 (definition of malfunction).

Finally, the EPA recognizes that even equipment that is properly designed and maintained can sometimes fail, and that such failure can sometimes cause an exceedance of the relevant emission standard or other violation. (See, e.g., State Implementation Plans: Policy Regarding Excessive Emissions During Malfunctions, Startup, and Shutdown (Sept. 20, 1999); Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions (Feb. 15, 1983)). The EPA is,

therefore, proposing to add to the final rule an affirmative defense to civil penalties for exceedances of emission limits or other violations of applicable standards that are caused by malfunctions. See 40 CFR 63.11502 (defining "affirmative defense" to mean, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding). We also are proposing regulatory provisions to specify the elements that are necessary to establish this affirmative defense; the source must prove by a preponderance of the evidence that it has met all of the elements set forth in 40 CFR 63.11501(e). See 40 CFR 22.24. The criteria ensure that the affirmative defense is available only where the event that causes an exceedance of the emission limit meets the narrow definition of malfunction in 40 CFR 63.2 (sudden, infrequent, not reasonable preventable and not caused by poor maintenance and or careless operation). For example, to successfully assert the affirmative defense, the source must prove by a preponderance of the evidence that excess emissions "[w]ere caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual

manner….” The criteria also are designed to ensure that steps are taken to correct the malfunction, to minimize emissions in accordance with CAA section 63.11501(e), and to prevent future malfunctions. For example, the source must prove by a preponderance of the evidence that “[r]epairs were made as expeditiously as possible when the applicable emission limitations were being exceeded…” and that “[a]ll possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health….” In any judicial or administrative proceeding, the Administrator may challenge the assertion of the affirmative defense, and, if the respondent has not met its burden of proving all of the requirements in the affirmative defense, appropriate penalties may be assessed in accordance with section 113 of the CAA (see also 40 CFR 22.77).

The EPA included an affirmative defense in the final rule in an attempt to balance a tension, inherent in many types of air regulation, to ensure adequate compliance while simultaneously recognizing that despite the most diligent of efforts, emission limits may be exceeded under circumstances beyond the control of the source. The EPA must establish emission standards that “limit the quantity, rate, or concentration of emissions of air pollutants on a continuous

basis." 42 U.S.C. 7602(k) (defining "emission limitation and emission standard"). See, e.g., Sierra Club v. EPA, 551 F.3d 1019, 1021 (D.C. Cir. 2008). Thus, the EPA is required to ensure that section 112 emissions limitations are continuous. The affirmative defense for malfunction events meets this requirement by ensuring that even where there is a malfunction, the emission limitation is still enforceable through injunctive relief. While "continuous" limitations, on the one hand, are required, there is also case law indicating that, in many situations, it is appropriate for the EPA to account for the practical realities of technology. For example, in Essex Chemical v. Ruckelshaus, 486 F.2d 427, 433 (D.C. Cir. 1973), the District of Columbia Circuit Court acknowledged that, in setting standards under CAA section 111 "variant provisions" such as provisions allowing for upsets during startup, shutdown and equipment malfunction "appear necessary to preserve the reasonableness of the standards as a whole and that the record does not support the 'never to be exceeded' standard currently in force." See also, Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C.Cir. 1973). Though intervening case law such as Sierra Club v. EPA and the CAA 1977 amendments undermine the relevance of these cases today, they support the EPA's view that a system that incorporates some level of flexibility is

reasonable. The affirmative defense simply provides for a defense to civil penalties for excess emissions that are proven to be beyond the control of the source. By incorporating an affirmative defense, the EPA has formalized its approach to upset events. In a Clean Water Act setting, the Ninth Circuit required this type of formalized approach when regulating "upsets beyond the control of the permit holder." Marathon Oil Co. v. EPA, 564 F.2d 1253, 1272-73 (9th Cir. 1977). But see, Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1057-58 (D.C. Cir. 1978) (holding that an informal approach is adequate). The affirmative defense provisions give the EPA the flexibility to both ensure that its emission limitations are "continuous" as required by 42 U.S.C. 7602(k), and account for unplanned upsets and thus support the reasonableness of the standard as a whole.

The EPA has attempted to ensure that we have not incorporated into proposed regulatory language any provisions that are inappropriate, unnecessary, or redundant in the absence of the SSM exemption. We are specifically seeking comment on whether there are any such provisions that we have inadvertently incorporated or overlooked. We are also seeking comment on the inclusion of the affirmative defense provisions. Finally, we solicit comment on provisions in the final rule applicable to

startup and shutdown periods for continuous and batch process vents.

In addition to the affirmative defense provisions described above, we are also proposing several changes throughout the rule and in Table 9 (the table that specifies applicability of General Provisions to subpart VVVVVV of 40 CFR part 63) to specify applicable requirements during periods of startup and shutdown and periods of malfunction. For example, we are proposing to add new paragraphs in 40 CFR 63.11501(c)(1)(vii) and (viii) that would require records of the occurrence and duration of malfunctions, as well as records of actions taken to minimize emissions during these periods and to fix malfunctioning equipment. We are also proposing to add a paragraph in 40 CFR 63.11501(d)(8) that would require reporting of information related to each malfunction. Table 9 in the final rule states that 63.6(e)(1)(i) does not apply to subpart VVVVVV. We are also proposing to add a new paragraph in 40 CFR 63.11495(d) that specifies the general duty to minimize emissions applies at all times. In addition to the proposed changes in the text of the rule, entries for 40 CFR 63.6(e)(1)(i), 63.10(b)(2) and 63.10(d)(5) also would be changed to reference the new paragraphs in 40 CFR 63.11495(d), 63.11501(c) and 63.11501(d). Finally, we are proposing to revise

Table 9 to state that the performance testing requirements in 40 CFR 63.7(e)(1) do not apply. The comments to Table 9 for that provision identify the location of the applicable performance testing requirements for CMAS sources.

VI. Requirements for Metal HAP Process Vents

A. Definition of Metal HAP Process Vent

A metal HAP process vent is defined in the final rule as "the point of discharge to the atmosphere (or inlet to a control device, if any) of a metal HAP-containing gas stream from any CMPU at an affected source." We are requesting comment on the applicability of this definition to all types of equipment from which metal HAP are emitted. We are particularly interested in comments on how well it applies to chemical manufacturing processes in comparison to the definitions for batch and continuous process vents, which have been used in HON, MON and several other MACT standards for chemical manufacturing.

B. Metal HAP Process Vent Standards

Since promulgation, we determined that the final rule does not clearly explain how the rule applies when the Table 1 metal HAP are emitted as a gaseous organo-metallic compound along with other organic compounds that are routed to an incinerator for control. To clarify our intent, the following discussion summarizes the requirements in the final rule for all types of

metal HAP compounds, including organo-metallic compounds. It also identifies potential limitations in these requirements and requests information to enable better characterization of affected CMPU.

Table 4 to 40 CFR part 63, subpart VVVVVV specifies that an owner or operator of an affected CMPU with metal HAP emissions equal to or greater than 400 pounds per year (lb/yr) must reduce the metal HAP emissions by at least 95 percent. The emission limit specified in Table 4 to subpart VVVVVV does not differentiate between compounds that are emitted as particulate and compounds that are emitted as vapor or as liquid droplets, or between organic and inorganic compounds. All Table 1 metal HAP compounds in all phases are subject. Thus, in the case of a CMPU that uses an organo-metallic Table 1 metal HAP compound, both the 400 lb/yr threshold and 95-percent emission limit apply. Although combustion would change the type of Table 1 metal HAP compound(s) emitted, it would not destroy the metal itself and likely would not reduce the mass by 95 percent. Thus, if the uncontrolled metal HAP emissions are greater than 400 lb/yr, additional control of the metal HAP would be required either upstream or downstream of the incinerator.

To demonstrate initial compliance, the owner or operator must conduct either a performance test or an engineering

assessment (except new sources using a baghouse as a control device are required to conduct a performance test). If the owner or operator elects to conduct a performance test for a CMPU from which the metal HAP are emitted as a vapor, then the test must be conducted using Method 29 because the other specified alternative, Method 5, is not applicable. To demonstrate ongoing compliance, the owner or operator must develop and operate in accordance with a site-specific monitoring plan. This requirement applies for any type of control device used to control metal HAP emissions.

Although the metal HAP requirements apply to all Table 1 metal HAP as described above, the 400 lb/yr threshold was developed, primarily, based on information from CMPU where the metal HAP is emitted as particulate. In general, these facilities processed ores and/or manufactured solid materials such as pigments, catalysts or manganese dioxide. Some metal HAP at certain steps in some processes are liquids or dissolved in solvents, but these metal HAP compounds typically have very low vapor pressures and emissions; the bulk of the metal HAP emissions are particulates from operations such as grinding, mixing, calcining, drying and packaging. In addition, the control cost impacts were developed assuming the metal HAP are emitted in the form of particulate (See Docket ID No. EPA-HQ-

OAR-2008-0334-0005). Therefore, we are requesting comment on whether there are reasons GACT for processes that emit gaseous Table 1 metal HAP should be different from GACT, as specified in the final rule. We are particularly interested in information on the types of processes that emit gaseous Table 1 metal HAP, the range in uncontrolled emissions from such processes, the types of emission points (i.e., are these emission points consistent with the definition of "metal HAP process vent"), the types of control devices used to control such emissions and whether those processes also emit particulate metal HAP.

VII. Technical Corrections and Clarifications

We are proposing several technical corrections. These amendments are being proposed to correct inaccuracies and oversights that were promulgated in the final rule. These proposed changes are described in Table 1 of this preamble. We request comment on all of these proposed changes.

Table 1. Miscellaneous Technical Corrections to 40 CFR Part 63, Subpart VVVVVV

Section of subpart VVVVVV	Description of correction
40 CFR 63.11494(a)(3)	We are proposing several changes to this paragraph. First, we are proposing to clarify that the 0.1-percent and 1.0-percent concentration thresholds are on a mass basis of the compound containing the Table 1 HAP. Second, we are proposing to clarify that all Table 1 HAP, except for quinoline and manganese compounds, are considered

	carcinogenic, probably carcinogenic or possibly carcinogenic. Therefore, the concentration threshold of 1.0 weight percent applies only to quinoline and manganese compounds, and the threshold of 0.1 weight percent applies to all other Table 1 HAP. Third, because it is not clear under the final rule whether an emission stream that contains a Table 1 HAP as a gaseous byproduct is a "process fluid," we are proposing changes to clarify applicability of CMPU that generate a Table 1 HAP byproduct. If Table 1 HAP are generated as byproduct, the proposed changes clarify that the CMPU is subject to the rule if the concentration of the Table 1 HAP in any liquid stream in the CMPU exceeds the same thresholds that apply to feedstocks. Specifically, if quinoline is generated as a byproduct, then the CMPU is subject if the quinoline concentration in any liquid stream in the CMPU exceeds 1.0 percent by weight. Similarly, if hydrazine or any other organic Table 1 HAP is generated as a byproduct, then the process is subject if the collective concentration of these compounds in any liquid stream is greater than 0.1 percent by weight. In addition, the proposed changes also specify that a CMPU is subject if the collective concentration of these Table 1 HAP exceeds 50 parts per million by volume in any process vent stream. This threshold was specified because this concentration defines a process vent, and such emissions streams are subject to control. Finally, we are proposing to consolidate paragraphs (a)(1) and (3) to eliminate redundancy.
40 CFR 63.11494(c)(1)(vii)	We are proposing to add a new paragraph that would list lead oxide production at lead acid battery manufacturing facilities in those operations for

	which this subpart does not apply. These sources are covered by 40 CFR part 63, subpart PPPPPP – NESHAP for Lead Acid Battery Manufacturing Area Sources.
40 CFR 63.11494(d)	We are proposing to clarify that a CMPU using only Table 1 metal HAP is not subject to any requirements for wastewater systems or heat exchange systems. Only organic HAP are subject to wastewater and heat exchange system requirements. We are proposing this change based on the fact that most metal HAP compounds have a very low vapor pressure and would not volatilize from wastewater or cooling water. However, given our discussion of organo-metallic compounds in **section VI.B** of this preamble, we are also requesting comment on whether this change should be limited to only certain types or classes of metal HAP compounds for wastewater systems, heat exchange systems or both types of systems.
40 CFR 63.11495(a)(3)	To clarify and improve the readability of this section, we are proposing to split it into an introductory section with five subsections. One sentence that contains two concepts also would be split into two separate sentences. The requirements, however, have not changed.
40 CFR 63.11496(f)(3)(i)(C)	We are proposing to edit this paragraph to add the acronym “CMS.”
40 CFR 63.11496(f)(3)(ii)	We are proposing to edit the first sentence in this paragraph to remove the unnecessary word “report.”
40 CFR 63.11496(f)(3)(ii)	To demonstrate initial compliance with the emissions limit for HAP metals, 40 CFR 63.11496(f)(3)(ii) in the final rule requires either a performance test or engineering assessment. This paragraph in the final rule also specifies that a performance test must

	be conducted under representative process operating conditions, but it does not specify conditions under which an engineering assessment must be conducted. To correct this oversight, and maintain consistency with the conditions under which performance testing must be conducted, we are proposing to modify 40 CFR 63.11496(f)(3)(ii) to clarify that if a source elects to conduct an engineering assessment to demonstrate initial compliance with the standards for metal HAP process vents, then the design evaluation must be conducted at representative operating conditions for the CMPU.
40 CFR 63.11498(a)(2), 63.11502(b), and Table 6	Other rules, such as the HON, specify that discharge of wastewater to a Resource Conservation and Recovery Act (RCRA)-permitted underground injection well is a treatment (i.e., control) option for wastewater streams. We intended to include the same option in 40 CFR part 63, subpart VVVVVV. However, "wastewater treatment" is defined in 40 CFR 63.11502 as procedures that remove or reduce HAP, which does not clearly include discharge to an underground injection well. To clarify this point, we are proposing to add a definition of "hazardous waste treatment" in 40 CFR 63.11502(b) to mean treatment in a RCRA-permitted incinerator, process heater, boiler or underground injection well. The specific language in the proposed definition is consistent with 40 CFR 63.138(h) of the HON wastewater provisions. We are also proposing corresponding changes to Table 6 to subpart VVVVVV. Specifically, for each wastewater stream, Item 1.a would require either wastewater treatment or hazardous waste treatment. In addition, Item 2.b would be edited to use the new

	term “hazardous waste treatment.” The proposed changes to Item 1.a also make it clear that the treatment conducted to meet Item 2.b would satisfy the requirements of Item 1.a.
40 CFR 63.11501(c)(4)(i)	We are proposing to replace the incorrect word “dimension” with the correct word “dimensions.”
40 CFR 63.11502(a)	We are proposing to insert a reference to the definition of the term “isolated intermediate” in 40 CFR 63.2550 of the MON because this term is used in the definitions of several other terms in 40 CFR 63.11502.
40 CFR 63.11502(b)	We are proposing to modify the definition of “product” to remove “isolated intermediates” from the list of materials that are not considered products. This change would make the definition of product consistent with the definitions of chemical manufacturing process and isolated intermediate. A chemical manufacturing process is defined as all equipment which collectively functions to produce a product or isolated intermediate. Isolated intermediate is defined as a product of a process that is stored before subsequent processing.
40 CFR 63.11502(b)	We are proposing to add a definition for the term “uncontrolled emissions” because the control threshold for batch process vents and metal HAP process vents in 40 CFR 63.11496(a) and (f) use this term. The proposed definition would read as follows: “Uncontrolled emissions means process vent emissions at the outlet of the last recovery device, if any, and prior to any control device. In the absence of both recovery devices and control devices, uncontrolled emissions are the emissions discharged to the atmosphere.”

VIII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it may raise novel legal or policy issues. Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866 and Executive Order 13563 (76 FR 3821, January 21, 2011), and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

The information collection requirements in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501, et seq. The Information Collection Request (ICR) document prepared by the EPA has been assigned EPA ICR number 2323.03. The information collection requirements are not enforceable until OMB approves them.

The information requirements are based on notification, recordkeeping and reporting requirements in the NESHAP General Provisions (40 CFR part 63, subpart A), which are mandatory for

all operators subject to national emission standards. These recordkeeping and reporting requirements are specifically authorized by section 114 of the CAA (42 U.S.C. 7414). All information submitted to the EPA pursuant to the recordkeeping and reporting requirements for which a claim of confidentiality is made is safeguarded according to agency policies set forth in 40 CFR part 2, subpart B.

For this proposed rule, the EPA is adding affirmative defense to the estimate of burden in the ICR. To provide the public with an estimate of the relative magnitude of the burden associated with an assertion of the affirmative defense position adopted by a source, the EPA has provided administrative adjustments to this ICR to show what the notification, recordkeeping and reporting requirements associated with the assertion of the affirmative defense might entail. The EPA's estimate for the required notification, reports and records for any individual incident, including the root cause analysis, totals $2,958 and is based on the time and effort required of a source to review relevant data, interview plant employees, and document the events surrounding a malfunction that has caused an exceedance of an emissions limit. The estimate also includes time to produce and retain the record and reports for submission to the EPA. The EPA provides this illustrative estimate of this

burden because these costs are only incurred if there has been a violation and a source chooses to take advantage of the affirmative defense.

Given the variety of circumstances under which malfunctions could occur, as well as differences among sources' operation and maintenance practices, we cannot reliably predict the severity and frequency of malfunction-related excess emissions events for a particular source. It is important to note that the EPA has no basis currently for estimating the number of malfunctions that would qualify for an affirmative defense. Current historical records would be an inappropriate basis, as source owners or operators previously operated their facilities in recognition that they were exempt from the requirement to comply with emissions standards during malfunctions. Of the number of excess emissions events reported by source operators, only a small number would be expected to result from a malfunction (based on the definition above), and only a subset of excess emissions caused by malfunctions would result in the source choosing to assert the affirmative defense. Thus, we believe the number of instances in which source operators might be expected to avail themselves of the affirmative defense will be extremely small. For this reason, we estimate no more than 2 or 3 such occurrences for all sources subject to 40 CFR part 63, subpart

VVVVVV over the 3-year period covered by this ICR. We expect to gather information on such events in the future and will revise this estimate as better information becomes available. The annual monitoring, reporting and recordkeeping burden for this collection (averaged over the first 3 years after the effective date of the standards) for these amendments to subpart VVVVVV is estimated to be $3,141 per year. This includes 30 labor hours per year at a total labor cost of $3,141 per year. There is no change in annual burden to the federal government for these amendments.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When these ICR are approved by OMB, the agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control numbers for the approved information collection requirements contained in the final rules.

To comment on the agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, the EPA has established a public docket for this rule, which includes this

ICR, under Docket ID number EPA-HQ-OAR-2008-0334. Submit any comments related to the ICR to the EPA and OMB. See the ADDRESSES section at the beginning of this notice for where to submit comments to the EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW, Washington, DC 20503, Attention: Desk Office for the EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after [**INSERT DATE OF PUBLICATION OF THIS PROPOSED RULE IN THE FEDERAL REGISTER]**, a comment to OMB is best assured of having its full effect if OMB receives it by **[INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this proposed rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's regulations at 13 CFR 121.201(less than 500, 750 or 1,000 employees, depending on the specific NAICS Code under subcategory 325); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any new requirements on any small entities because it does not impose any additional regulatory requirements beyond those already promulgated in the final rule. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of

1995 (UMRA), 2 U.S.C. 1531-1538 for state, local or tribal governments or the private sector. This proposed rule imposes no enforceable duty on any state, local or tribal governments or the private sector. Therefore, this proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This rule proposes amendments to aid with compliance, but does not change the level of the standards in the rule.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This proposed rule will not impose direct compliance costs on state or local governments, and will not preempt state law. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between the EPA and state

and local governments, the EPA specifically solicits comment on this proposed action from state and local officials.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This proposed rule does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will not have substantial direct effects on tribal governments, on the relationship between the federal government and Indian tribes or on the distribution of power and responsibilities between the federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this proposed rule.

The EPA specifically solicits additional comment on this proposed action from tribal officials.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation. This proposed rule is not subject to Executive Order 13045 because it is based solely on technology performance.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. Further, this action does not change the level of standards already in place.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) of 1995, Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards (VCS) in its regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. VCS are technical standards (e.g., materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by VCS bodies. NTTAA directs the EPA to provide Congress, through OMB, explanations when the agency decides not use available and applicable VCS.

This proposed rulemaking does not involve technical standards. Therefore, the EPA did not consider the use of any VCS.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the United States.

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. The amendments do not relax the control measures on sources regulated by the rules, and, therefore, will not cause emissions increases from these sources.

List of Subjects in 40 CFR Part 63

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances.

Dated: January 13, 2012.

Lisa P. Jackson,
Administrator.

For the reasons cited in the preamble, title 40, chapter I, part 63 of the Code of Federal Regulations is proposed to be amended as follows:

PART 63--[AMENDED]

1. The authority citation for part 63 continues to read as follows:

Authority: 42 U.S.C. 7401, et seq.

Subpart VVVVVV—[AMENDED]

2. Section 63.11494 is amended by:

a. Revising paragraph (a);

b. Adding paragraph (c)(1)(vii);

c. Revising the last sentence in paragraph (d); and

d. Revising paragraph (e) to read as follows:

§63.11494 What are the applicability requirements and compliance dates?

(a) Except as specified in paragraph (c) of this section, you are subject to this subpart if you own or operate a chemical manufacturing process unit (CMPU) that meets the conditions specified in paragraphs (a)(1) and (2) of this section.

(1) The CMPU is located at an area source of hazardous air pollutant (HAP) emissions.

(2) HAP listed in Table 1 to this subpart (Table 1 HAP) are present in the CMPU, as specified in paragraph (a)(2)(i), (ii), (iii), (iv) or (v) of this section.

(i) The CMPU uses as feedstock, any material that contains quinoline and/or manganese compounds at a concentration greater than 1.0 percent by weight, or other Table 1 HAP at a collective concentration greater than 0.1 percent by weight. To determine the Table 1 HAP content of feedstocks, you may rely on formulation data provided by the manufacturer or supplier, such as the Material Safety Data Sheet (MSDS) for the material. If the concentration in an MSDS is presented as a range, use the upper bound of the range.

(ii) Quinoline is generated as byproduct and is present in the CMPU in any liquid stream (process or waste) at a concentration greater than 1.0 percent by weight.

(iii) Hydrazine and/or Table 1 organic compounds other than quinoline are generated as byproduct and are present in the CMPU in any liquid stream (process or waste) at a collective concentration greater than 0.1 percent by weight.

(iv) Hydrazine and/or any Table 1 organic compounds are generated as byproduct and are present in the CMPU in any process vent stream at a collective concentration greater than 50 parts per million by volume (ppmv).

(v) Hydrazine or any Table 1 organic compound is produced as a product of the CMPU.

* * * * *

(c) * * *

(1) * * *

(vii) Lead oxide production at Lead Acid Battery Manufacturing Facilities, subject to subpart PPPPPP of this part.

* * * * *

(d) * * * A CMPU using only Table 1 metal HAP is required to control only total CAA section 112(b) metal HAP in accordance with §63.11495 and, if applicable, §63.11496(f).

* * * * *

(e) Any source subject to this subpart that installed a federally-enforceable control device on an affected CMPU by the first substantive compliance date of an otherwise applicable MACT standard, and, as a result, became an area source under 40 CFR part 63, is required to obtain a permit under 40 CFR part 70 or 40 CFR part 71. For existing sources subject to title V, as a result of this rule, a complete title V permit application must be submitted no later than 12 months after date of publication of the final rule amendments in the **Federal Register** if the source is subject to this rule on that date. New sources and

existing sources that become subject to this rule after date of publication of the final rule amendments in the **Federal Register** must submit a complete title V permit application no later than 12 months after becoming subject to this rule. Otherwise, you are exempt from the obligation to obtain a permit under 40 CFR part 70 or 40 CFR part 71, provided you are not otherwise required by law to obtain a permit under 40 CFR 70.3(a) or 40 CFR 71.3(a). Notwithstanding the previous sentence, you must continue to comply with the provisions of this subpart.

* * * * *

3. Section 63.11495 is amended by:

a. Revising paragraphs (a)(1) and (a)(3);

b. Adding paragraph (c) heading; and

c. Adding paragraph (d) to read as follows:

§63.11495 What are the management practices and other requirements?

(a) * * *

(1) Each process vessel must be equipped with a cover or lid that must be closed at all times when it is in organic HAP service or metal HAP service, except for manual operations that require access, such as material addition and removal, inspection, sampling and cleaning.

* * * * *

(3) You must conduct inspections of process vessels and equipment for each CMPU in organic HAP service or metal HAP service, as specified in paragraphs (a)(3)(i) through (v) of this section, to demonstrate compliance with paragraph (a)(1) of this section and to determine that the process vessels and equipment are sound and free of leaks.

(i) Inspections must be conducted at least quarterly.

(ii) For these inspections, detection methods incorporating sight, sound or smell are acceptable. Indications of a leak identified using such methods constitute a leak unless you demonstrate that the indications of a leak are due to a condition other than loss of HAP. If indications of a leak are determined not to be HAP in one quarterly monitoring period, you must still perform the inspection and demonstration in the next quarterly monitoring period.

(iii) As an alternative to conducting inspections, as specified in paragraph (a)(3)(ii) of this section, you may use Method 21 of 40 CFR part 60, appendix A-7, with a leak definition of 500 ppmv to detect leaks. You may also use Method 21 with a leak definition of 500 ppmv to determine if indications of a leak identified during an inspection conducted in accordance with paragraph (a)(3)(ii) of this section are due to a condition other than loss of HAP. The procedures in this

paragraph (a)(3)(iii) may not be used as an alternative to the inspection required by paragraph (a)(3)(ii) of this section for process vessels that contain metal HAP as particulate.

(iv) Inspections must be conducted while the subject CMPU is operating.

(v) No inspection is required in a calendar quarter during which the subject CMPU does not operate for the entire calendar quarter and is not in organic HAP service or metal HAP service. If the CMPU operates at all during a calendar quarter, an inspection is required.

* * * * *

(c) Startup, shutdown and malfunction. * * *

(d) General duty. At all times, you must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. Determination of whether such operation and maintenance procedures are being used will be based on information available to the Administrator, which may include, but is not limited to, monitoring results, review of operation and maintenance procedures, review of operation and maintenance records and inspection of the source.

4. Section 63.11496 is amended by revising paragraphs (f)(3)(i)(C), (f)(3)(ii) and (g)(1) to read as follows:

§63.11496 What are the standards and compliance requirements for process vents?

* * * * *

(f) * * *

(3) * * *

(i) * * *

(C) Operation and maintenance plan for the control device (including a preventative maintenance schedule consistent with the manufacturer's instructions for routine and long-term maintenance) and continuous monitoring system (CMS).

* * * * *

(ii) You must conduct a performance test or an engineering assessment for each CMPU subject to a HAP metals emissions limit in Table 4 to this subpart and report the results in your Notification of Compliance Status (NOCS). Each performance test or engineering assessment must be conducted under representative operating conditions, and sampling for each performance test must be conducted at both the inlet and outlet of the control device. Upon request, you shall make available to the Administrator such records as may be necessary to determine the conditions of performance tests. If you own or operate an

existing affected source, you are not required to conduct a performance test if a prior performance test was conducted within the 5 years prior to the effective date using the same methods specified in paragraph (f)(3)(iii) of this section, and, either no process changes have been made since the test, or, if you can demonstrate that the results of the performance test, with or without adjustments, reliably demonstrate compliance despite process changes.

* * * * *

(g) * * *

(1) Requirements for Performance Tests. (i) The requirements specified in §§63.2450(g)(1) through (4) apply instead of, or in addition to, the requirements specified in 40 CFR part 63, subpart SS.

(ii) Upon request, you shall make available to the Administrator, such records as may be necessary to determine the conditions of performance tests.

* * * * *

5. Section 63.11498 is amended by revising paragraph (a)(2) to read as follows:

§63.11498 What are the standards and compliance requirements for wastewater systems?

(a) * * *

(2) You are not required to determine the partially soluble concentration in wastewater that is hard piped to a combustion unit or hazardous waste treatment unit, as specified in Table 6, Item 2.b to this subpart, or Table 6, Item 2.c to this subpart.

* * * * *

6. Section 63.11501 is amended by:

a. Revising the section heading;

b. Revising the second sentence in paragraph (c) introductory text, and paragraph (c)(1) introductory text;

c. Adding paragraphs (c)(1)(vii) and (c)(1)(viii);

d. Revising paragraph (c)(4)(i);

e. Adding paragraph (c)(8);

d. Revising the second sentence in paragraph (d) introductory text;

e. Adding paragraph (d)(8); and

f. Adding paragraph (e) to read as follows:

§63.11501 What are the notification, recordkeeping, and reporting requirements, and how may I assert an affirmative defense for exceedance of emission limit during malfunction?

* * * * *

(c) * * * If you are subject, you must comply with the recordkeeping and reporting requirements of §63.10(b)(2)(iii)

and (vi) through (xiv), and the applicable requirements specified in paragraphs (c)(1) through (8) of this section.

(1) For each CMPU subject to this subpart, you must keep the records specified in paragraphs (c)(1)(i) through (viii) of this section.

* * * * *

(vii) Records of the occurrence and duration of each malfunction of operation (i.e., process equipment) or the air pollution control and monitoring equipment.

(viii) Records of actions taken during periods of malfunction to minimize emissions in accordance with §63.11495(d), including corrective actions to restore malfunctioning process and air pollution control and monitoring equipment to its normal or usual manner of operation.

* * * * *

(4) * * *

(i) Keep records of the vessel dimensions, capacity, and liquid stored, as specified in §63.1065(a).

* * * * *

(8) For continuous process vents subject to Table 3 to this subpart, keep records of the occurrence and duration of each startup and shutdown of operation of process equipment, or of air pollution control and monitoring equipment.

(d) * * * Reports are required only for semiannual periods during which you experienced any of the events described in paragraphs (d)(1) through (8) of this section.

* * * * *

(8) Malfunctions. If a malfunction occurred during the reporting period, the report must include the number, duration and a brief description for each type of malfunction which occurred during the reporting period, and which caused or may have caused any applicable emission limitation to be exceeded. The report must include an estimate of the volume of regulated pollutants emitted and attributed to the malfunction, with a description of the method used to estimate the emissions. The report must also include a description of actions you took during a malfunction of an affected source to minimize emissions in accordance with §63.11495(d), including actions taken to correct a malfunction.

(e) Affirmative defense for exceedance of emission limit during malfunction. In response to an action to enforce the standards set forth in §§63.11495 through 63.11499, you may assert an affirmative defense to a claim for civil penalties for exceedances of such standards that are caused by malfunction, as defined at 40 CFR 63.2. Appropriate penalties may be assessed, however, if you fail to meet your burden of proving all of the

requirements in the affirmative defense. The affirmative defense is not available for claims for injunctive relief.

(1) To establish the affirmative defense in any action to enforce such a limit, you must timely meet the notification requirements in paragraph (e)(2) of this section, and must prove by a preponderance of evidence that:

(i) The excess emissions:

(A) Were caused by a sudden, infrequent and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner; and

(B) Could not have been prevented through careful planning, proper design, or better operation and maintenance practices; and

(C) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and

(D) Were not part of a recurring pattern indicative of inadequate design, operation or maintenance; and

(ii) Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and

(iii) The frequency, amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions; and

(iv) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury or severe property damage; and

(v) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health; and

(vi) All emissions monitoring and control systems were kept in operation, if at all possible, consistent with safety and good air pollution control practices; and

(vii) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs; and

(viii) At all times, the affected source was operated in a manner consistent with good practices for minimizing emissions; and

(ix) A written root cause analysis has been prepared, the purpose of which is to determine, correct and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis must

also specify, using best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.

(2) Notification. If you experience an exceedance of your emission limit(s) during a malfunction, you must submit a written report to the Administrator within 45 business days of the initial occurrence of the exceedance of the standard(s) in §§63.11495 through 63.11499 to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in paragraph (e)(1) of this section. You may seek an extension of this deadline for up to 30 additional business days by submitting a written request to the Administrator before the expiration of the 45 business-day period. Until a request for an extension has been approved by the Administrator, you are subject to the requirement to submit such report within 45 business days.

7. Section 63.11502 is amended by:

a. Adding in alphabetical order the term "Isolated intermediate (§63.2550)," and removing the term "Family of materials (§63.2550)" in paragraph (a); and

b. Adding in alphabetical order definitions for "Affirmative defense," "Family of materials," "Hazardous waste treatment," and "Uncontrolled emissions," revising paragraph (1)

of the definition of "Chemical manufacturing process," and revising the definitions for "In organic HAP service" and "Product" in paragraph (b) to read as follows:

§63.11502 What definitions apply to this subpart?

(a) * * *

Isolated intermediate (§63.2550)

* * * * *

(b) * * *

Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

* * * * *

Chemical manufacturing process * * *

(1) All cleaning operations;

* * * * *

Family of materials means a grouping of materials that have the same basic composition or the same basic end use or functionality; are produced using the same basic feedstocks, the same manufacturing equipment configuration and in the same sequence of steps; and whose production results in emissions of the same Table 1 HAP at approximately the same rate per pound of

product produced. Examples of families of materials include multiple grades of same product or different variations of a product (e.g., blue, black and red resins).

* * * * *

Hazardous waste treatment, as used in the wastewater requirements, means treatment in any of the following units:

(1) A hazardous waste incinerator for which the owner or operator has been issued a final permit under 40 CFR part 270 and complies with the requirements of 40 CFR part 264, subpart O, or has certified compliance with the interim status requirements of 40 CFR part 265, subpart O;

(2) A process heater or boiler for which you either have been issued a final permit under 40 CFR part 270 and comply with the requirements of 40 CFR part 266, subpart H, or for which you have certified compliance with the interim status requirements of 40 CFR part 266, subpart H; or

(3) An underground injection well for which the owner or operator has been issued a final permit under 40 CFR part 270 or 40 CFR part 144 and complies with the requirements of 40 CFR part 122.

* * * * *

In organic HAP service means that a process vessel or piece of equipment either contains or contacts a feedstock, byproduct

or product that contains an organic HAP, excluding any organic HAP used in manual cleaning activities. A process vessel is no longer in organic HAP service after the vessel has been emptied to the extent practicable (i.e., a vessel with liquid left on process vessel walls or as bottom clingage, but not in pools, due to floor irregularity, is considered completely empty) and any cleaning has been completed.

* * * * *

Product means a compound or chemical which is manufactured as the intended product of the CMPU. Products include co-products. By-products, impurities, wastes and trace contaminants are not considered products.

* * * * *

Uncontrolled emissions means process vent emissions at the outlet of the last recovery device, if any, and prior to any control device. In the absence of both recovery devices and control devices, uncontrolled emissions are the emissions discharged to the atmosphere.

* * * * *

Table 6 to Subpart VVVVVV of Part 63—[AMENDED]

8. Table 6 to subpart VVVVVV of part 63 is revised to read as follows:

Table 6 to Subpart VVVVVV of Part 63—-Emission Limits and Compliance Requirements for Wastewater Systems

As required in §63.11498, you must comply with the requirements for wastewater systems as shown in the following table.

For each…	**You must…**	**And you must…**
1. Wastewater Stream	a. Discharge to onsite or offsite wastewater treatment or hazardous waste treatment	i. Maintain records identifying each wastewater stream and documenting the type of treatment that it receives. Multiple wastewater streams with similar characteristics and from the same type of activity in a CMPU may be grouped together for record-keeping purposes.
2. Wastewater stream containing partially soluble HAP at a concentra-tion ≥10,000 ppmw and separate organic and water phases	a. Use a decanter, steam stripper, thin film evaporator, or distillation unit to separate the water phase from the organic phase(s); or	i. For the water phase, comply with the requirements in Item 1 of this table, and ii. For the organic phase(s), recycle to a process, use as fuel, or dispose as hazardous waste either onsite or offsite, and iii. Keep records of the wastewater streams subject to this requirement and the disposition of the organic phase(s).
	b. Hard pipe the entire wastewater stream to onsite hazardous waste treatment, or hard pipe the entire wastewater stream to	i. Keep records of the wastewater streams subject to this requirement and the disposition of the wastewater streams.

	a point of transfer to offsite hazardous waste treatment.	

9. Table 9 to subpart VVVVVV of part 63 is amended by:

a. Revising the entry for 63.6(e)(1)(i) and (ii), (e)(3) and (f)(1);

b. Removing the entry for 63.7(a)(2), (b), (d), (e)(1)—(e)(3);

c. Adding a new entry for 63.7(a)(2), (b), (d), (e)(2)-(e)(3);

d. Adding a new entry for 63.7(e)(1);

e. Removing the entry for 63.8(a)(1), (a)(4), (b), (c)(1)-(c)(3), (f)(1)-(5);

f. Adding new entries for 63.8(a)(1), (a)(4), (b), (c)(1)(ii), (c)(2)-(c)(3), (f)(1)-(5), and 63.8(c)(1)(i) and 63.8(c)(1)(iii);

g. Removing the entry for 63.8(c)(6)-(c)(8), (d), (e), (f)(6);

h. Adding new entries for 63.8(c)(6)-(c)(8), (d)(1)-(d)(2), (e), (f)(6) and 63.8(d)(3);

i. Removing the entry for 63.10(b)(2)(i)—(b)(2)(v);

j. Adding new entries for 63.10(b)(2)(i), 63.10(b)(2)(ii), 63.10(b)(2)(iii), and 63.10(b)(2)(iv)—(v);

k. Removing the entry for 63.10(c)(7)-(c)(8), (c)(10)-(c)(12), (c)(15);

l. Adding new entries for 63.10(c)(7)-(8), 63.10(c)(10), 63.10(c)(11), 63.10(c)(12) and 63.10(c)(15); and

m. Revising the entry for 63.10(d)(5) to read as follows:

Table 9 to Subpart VVVVVV of Part 63--Applicability of General Provisions to Subpart VVVVVV

Citation	Subject	Applies to Subpart VVVVVV	Explanation
* *	* *	*	* *
63.6(e)(1)(i) and (ii), (e)(3), and (f)(1)	SSM Requirements	No	See §63.11495(d) for general duty requirement.
* *	* *	*	* *
63.7(a)(2), (b), (d), (e)(2)—(e)(3)	Performance Testing Schedule, Notification of Performance Test, Performance Testing Facilities, and Conduct of Performance Tests	Yes/No	Requirements apply if conducting test for metal HAP control; requirements in §§63.997(c)(1), (d), (e) and §63.999(a)(1) apply, as referenced in §63.11496(g), if conducting test for organic HAP or hydrogen halide and halogen HAP control device.
63.7(e)(1)	Performance Testing	No.	See §63.11496(f)(3)(ii) if conducting a test for metal HAP

			emissions. See §§63.11496(g) and 63.997(e)(1) if conducting a test for continuous process vents or for hydrogen halide and halogen emissions. See §§63.11496(g) and 63.2460(c) if conducting a test for batch process vents.
63.8(a)(1), (a)(4), (b), (c)(1)(ii), (c)(2)-(c)(3), (f)(1)-(5)	Monitoring Requirements	Yes	
63.8(c)(1)(i)	General Duty to Minimize Emissions and CMS Operation	No	
63.8(c)(1)(iii)	Requirement to Develop SSM Plan for CMS	No	
* *	* *	*	* *
63.8(c)(6)-(c)(8), (d)(1)-(d)(2), (e), (f)(6)		Yes	Requirements apply only if you use a continuous emission monitoring system (CEMS) to demonstrate compliance with the alternative standard in §63.11496(e).
63.8(d)(3)	Written Procedures for CMS	Yes	Requirement applies except for last sentence, which refers to an SSM plan. SSM plans are not required.
* *	* *	*	* *
63.10(b)(2)(i)	Recordkeeping of Occurrence and Duration of Startups and Shutdowns	No	See §63.11501(c)(8) for recordkeeping of occurrence and duration of each startup and shutdown

			for continuous process vents that are subpart to Table 3 to this subpart.
63.10(b)(2)(ii)	Recordkeeping of Malfunctions	No	See §63.11501(c)(1)(vii) and (viii) for recordkeeping of (1) occurrence and duration and (2) actions taken during malfunction.
63.10(b)(2)(iii)	Maintenance Records	Yes	
63.10(b)(2)(iv) and (v)	Actions Taken to Minimize Emissions During SSM	No	
* *	* *	* *	* *
63.10(c)(7)-(8)	Additional Recordkeeping Requirements for CMS - Identifying Exceedances and Excess Emissions	Yes	
63.10(c)(10)	Recordkeeping Nature and Cause of Malfunctions	No	See §63.11501(c)(1)(vii) and (viii) for malfunctions recordkeeping requirements.
63.10(c)(11)	Recording Corrective Actions	No	See §63.11501(c)(1)(vii) and (viii) for malfunctions recordkeeping requirements.
63.10(c)(12)		Yes	
63.10(c)(15)	Use of SSM Plan	No	
* *	* *	* *	* *
63.10(d)(5)	SSM Reports	No	See §63.11501(d)(8) for reporting requirements for

					malfunctions.	
*	*	*	*	*	*	*

[FR Doc. 2012-1610 Filed 01/27/2012 at 8:45 am; Publication Date: 01/30/2012]